verdict of the jury in favor of the plaintiff should, therefore, have been set aside and a new trial awarded upon the motion of the defendant.

Whether or not detaching the note from the said agreement and bringing suit upon the note alone was such an alteration of the contract, within the meaning of our decisions or Code 1904, § 2841a, art. 8, as would avoid the contract, ought not to be considered by this court at this time. That question was not raised in the trial court until after verdict, upon motion for a new trial and in arrest of judgment, when the plaintiff had no opportunity to explain the circumstances under which the alleged alteration was made.

It is unnecessary, and might be improper, to consider any of the other assignments of error, as upon the next trial the issues and proof may, and most probably will, be different.

The judgment complained of must be reversed, the verdict set aside, and the cause remanded, with leave to the plaintiff, if he be so advised, to amend his declaration, and for a new trial.

Note.

It would seem that even though it was not recited on the face of the contract attached to the note that it was to be paid only upon the fulfillment of a certain condition, extrinsic evidence might nevertheless have been introduced to show this collateral agreement. For it is one of the exceptions to the general rule excluding parol evidence, that such evidence is admissible to connect two or more instruments evidencing the same transaction, where the connection does not appear on their face. See Tuley *v.* Barton, 79 Va. 387; Pollock *v.* Glassel, 2 Gratt. 439.

Brown on Parol Ev., § 50, says: "Where the instrument does not express the entire agreement, and does not appear to express the entire agreement, or there is a collateral agreement not embraced therein, parol evidence is competent to show the omitted part, whether contemporaneous or antecedent, if it does not conflict with the instrument." Johnson *v.* Burns, 39 W. Va. 658, 20 S. E. 686; Rymer *v.* South Penn Oil Co., 54 W. Va. 530, 537, 46 S. E. 559.

MERRITT *v.* BUNTING.

June 13, 1907.

[57 S. E. 567.]

1. Public Lands—State Lands—Grants—Description—Sufficiency.—A grant of land from the state, which does not show where the land intended to be granted is located, except that it is on an island and is embraced within courses and distances, but which fails to give the starting point or ending point, and which does not identify the

land intended to be granted, is insufficient for indefiniteness of description.

2. Vendor and Purchaser—Bona Fide Purchaser—Notice of Prior Conveyance.—A recorded instrument conveying lands to be sufficient to give notice under the registry law to a subsequent purchaser must so describe and identify the premises conveyed as to afford the means of ascertaining with accuracy the premises conveyed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 513-539.]

3. Same—Actual Notice of Grant—Effect.—Where one had actual notice of a grant from the state, which failed to describe the land intended to be conveyed in such a manner as to enable one to identify the premises intended to be conveyed, he could not be charged with notice of any right under the grant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 474.]

4. New Trial—Grounds—Misconduct of Party and Jury.—Immediately after a trial the successful party stated that he had never lost a case, and did not expect to if the same was left to a jury, and he immediately followed up the jurors and handed to each of them who had not left for their homes $5, and sent $5 to each of the others. It also appeared that the successful party had attempted to bribe a state official. There were rumors that the party had talked with certain of the jurors during the trial. Held to require the setting aside of the verdict, though the court reproved the party and the jurors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 97-99.]

Error to Circuit Court, Accomac County.

Ejectment by John W. Bunting against D. M. Merritt. There was a judgment for plaintiff, and defendant brings error. Reversed, and new trial awarded.

John S. Parsons and *Mears & Mapp,* for plaintiff in error.
S. K. Powell and *J. H. Fletcher,* for defendant in error.

CARDWELL, J. D. M. Merritt, plaintiff in error here, defendant in the court below, on the 12th day of June, 1905, pursuant to the statute commonly spoken of as the "Oyster Laws," obtained an assignment from the oyster inspector of District No. 1, Accomac county, of two parcels of oyster-planting grounds, aggregating 24.62 acres situated on Little Assateague Bay, near Chincoteague Inlet, in said county; he having paid the fees and done all required of him by law to entitle him to the assignment.

At the October rules, 1905, of the circuit court of Accomac county, John W. Bunting, defendant in error here, brought an

action of ejectment against Merritt to recover the possession of certain oyster-planting ground embraced within certain lines given within the declaration filed, which include the 24.62 acres in the possession and occupancy of Merritt by virtue of his assignment from the oyster inspector of district No. 1, Accomac county.

At a trial of the cause at a special term of the circuit court, held February 16, 1906, a verdict was rendered by the jury in favor of the plaintiff for all the land embraced within the lines given in his declaration, which verdict the circuit court, at its March term, 1906, refused to set aside, and judgment was entered thereon in favor of the plaintiff for the possession of the 24.62 acres held and occupied by the defendant, Merritt, under his aforesaid assignment from the oyster inspector; the plaintiff in open court having disclaimed all right, title, and interest in and to so much of the land embraced in the verdict as had been theretofore assigned to other parties by the oyster inspector of district No. 1, Accomac county, and containing 4.55 acres. It is to that judgment this writ of error was awarded.

To sustain his right to the possession of the lands demanded in his declaration, Bunting relied in part upon three several deeds introduced in evidence, conveying to him certain lands in Accomac county adjacent to or bordering on Little Assateague Bay, and also a grant from Fred W. M. Holliday, Governor of Virginia, for 26.09 acres, dated April 2, 1878, which had never been recorded in Accomac county, to the introduction of which grant Merritt objected; but his objection was overruled, and to this ruling he duly took an exception and made it a part of the record, which exception constitutes his first assignment of error in this court.

To sustain his contention that as a riparian owner he also owned the whole of Little Assateague Bay, it was necessary for Bunting to establish his ownership of the lands adjacent to the bay on all of the shore sides thereof, and without the benefit of the grant from the Governor of the commonwealth of April 2, 1878, he would have failed to show that he was the owner of all the lands situated on the bay and extending down to low-water mark. In other words, Bunting's claim is that he owned the whole of the bay by virtue of owning the high ground around the bay; that his title as owner of the ground around the bay extended to low-water mark; that the bay ebbed bare; and that he therefore owned the whole of the bay.

The objection to the introduction of the grant from the Governor of the commonwealth, which was necessary to Bunting in order to show title to the highland on one side of the bay, was (1) that the patent in question had not been recorded in Accomac

county prior to Merritt's becoming the purchaser of the land for value, and was void as to him, he having neither notice nor knowledge of the grant at the time he took his assignment of the land in question from the oyster inspector, as before stated; and (2) that the description of the land embraced in the grant is so vague and indefinite that no one can locate the same from the description given therein.

Whether or not it was necessary to record this grant in Accomac county in order that it operate as notice to subsequent purchasers or incumbrancers of the land intended to be granted, we need not determine, as the grant, in our judgment is too vague and indefinite as to the location of the land it purported to grant to be considered as sufficient to give notice of the rights of the patentee, even if a subsequent purchaser or incumbrancer of the land had actual notice of it. It is true, as counsel for Bunting contend, that if the identity of the premises mentioned in the grant can be ascertained by extrinsic testimony, the grant would be valid; but, as we shall presently see, the authorities relied on in support of that contention do not apply to a case like this, where there is no description in the grant, even with extrinsic evidence sufficient to enable a party interested to identify the premises intended to be granted.

In this case there is nothing in the grant to show where the land intended to be granted is located, except that it is on Chincoteague Island, and embraced within certain courses and distances. There is no starting point or ending point given. Therefore by the grant any starting point might have been taken and the courses and distances run therefrom, provided the land thus located was situated on Chincoteague Island.

The county surveyor of Accomac county, while testifying for the defendant Merritt, was shown the grant from the Governor of Virginia to Bunting for 29.09 acres, and asked if, from the description given in that grant, he could locate the land supposed to be granted. He replied that he could not, as there was nothing in the grant to show where the land was located, except that it was on Chincoteague Island and was embraced within certain courses and distances; no starting point or ending point being given. He does, however, testify that he did locate the land embraced within the grant for Bunting, but that Bunting took him to this Little Assateague Bay and told him that the survey extended around the eastern side of the bay; that the surveyor (Bagwell) started at a point opposite the canal which empties into Chincoteague Channel, and then surveyed around the bay. But he further testifies that the survey made by Bagwell could not have started at that point; for, if it had started there, laying off the grant, and running the courses and distances given in the grant,

a great part of the land would have been in said bay, and, further, that the said survey could not have started at the point at which one of the chain carriers at the original survey claimed it did, to wit, at a point about half way between the east mouth of the canal, emptying into channel, and Little Island in Assateague Bay, because, running the courses and distances given in the grant, the land, or a greater part of it, would have been located in the bay. He gives other reasons for the conclusion that no survey had been made or could have been made locating the land embraced in the grant adjacent to Assateague Bay from the description given in the grant, but that such surveys as had been made were made by the arbitrary direction of Bunting himself.

Even a recorded instrument conveying lands, to be sufficient to give notice under the registry laws to a subsequent purchaser or incumbrancer, must so describe and identify the property conveyed as to afford the means of ascertaining with accuracy what and where it is.

In Florence *v.* Morien, 98 Va. 35, 34 S. E. 891, Buchanan, J., says: "The recorded instrument is sufficient to give notice under the registry laws, if the property be so described and identified that a subsequent purchaser or incumbrancer would have the means of ascertaining with accuracy what and where it was, and the language used be such that, if he should examine the instrument itself, he would obtain notice of all the rights which were intended to be created or conferred by it." See, also, Reid *v.* Rhodes, 56 S. E. 722, 1 Va. App. 69.

In Mundy *v.* Vawter, 3 Gratt. 518, a conveyance of "all the estate both real and personal" to which the grantor "is entitled in law or equity, in possession, remainder or reversion," was held valid to pass the grantor's whole estate as between the grantor and grantees, but that the registry of such a deed, conveying land by such general description, is not notice in law to a subsequent purchaser from the grantor of the existence of said deed; that actual notice of such a deed and of its contents would not affect a subsequent purchaser, unless he had notice that the land purchased by him was embraced by the deed; and that the proof of such notice must be such as to affect the conscience of the purchaser, and is not sufficient if it merely puts him upon inquiry. It must be so strong and clear as to fix upon him the imputation of mala fides. The opinion in that case was by Baldwin, J., and the reasoning applied there is entirely applicable to the case at bar.

As we said in the outset, if Merritt had had actual notice of the grant in question, it would not have been sufficient to charge him with notice of any right in Bunting to the land which is in controversy in this suit. We are therefore of opinion that the

circuit court erred in not rejecting the grant when offered in evidence, and for this error its judgment must be reversed and a new trial awarded.

If a new trial in this case were not awarded for the reason stated, we would feel constrained to award it for the following reasons:

Just after the trial of the case, to a remark made to him by a friend, "Well, Captain, I thought you were going to lose your case," Bunting replied: "But I didn't do it, did I? I never lost a case in this court, and I never expect to, if it is left to a jury." Bunting went immediately out of the courthouse and followed up the jurors, handing to each of them who had not left for their homes $5, and sent $5 to each of those who had left. Afterwards, upon a rule awarded by the judge of the circuit court against Bunting and the jurors to show cause why they should not be fined for contempt in the giving by Bunting and the receiving by the jurors each of $5 in the manner and under the circumstances stated, Bunting was fined $25 and four of the jurors $5 each for the alleged contempt, whereupon Bunting stepped up and requested to be and was allowed the privilege of paying the fines imposed upon the four jurors.

After the application by Merritt to the oyster inspector for the assignment of the oyster grounds in question had been posted according to law, Bunting, upon learning of the posting, complained to the oyster inspector that the land applied for belonged to him, and said to the inspector that, if the land did not belong to him, he was willing to pay taxes on it himself, and in conversations with the inspector and by letters to him it is clear that he tried to bribe the inspector to assign the land to him (Bunting), instead of to Merritt. The inspector testified that Bunting took him off in a room to himself in a hotel on Chincoteague Island and told him that he was not trying to bribe him at all, but there were tricks in all trades, and then went on to relate that he used to be running a blockade during the Civil War and would enter and go out of New York Harbor without any trouble when the other fellows could not do it; that he took along with him some $10 bills. To this the inspector, Taylor, replied: "Well, Capt. Bunting, $10 bills will not get you into this harbor." Bunting did not deny this on the witness stand, but admitted having written to the inspector "offering to give him as much as anybody else would to assign him (Bunting) the grounds," stating that the reason he did this was because he had been told that in order to get an assignment of the grounds he would have to "grease Taylor a little;" that subsequently he saw Taylor on Chincoteague Island, and told him

he was in a position to give him as much to assign the grounds to him as any one else, if he were being paid anything.

Such conduct on the part of a litigant and jurors casts a cloud of suspicion over the result of the trial, and to allow a litigant to reap the benefits of a verdict obtained under such suspicious circumstances would, as it appears to us, be a reproach upon the administration of justice in this state. It is true the learned judge below very promptly and properly attempted to punish and to reprove the parties engaged in this improper conduct; but that does not, in our opinion, reach the evil, which should be uprooted, even if it required, not only the punishment of the parties implicated, but the setting aside of any verdict rendered under such circumstances.

A Capt. Hill, a friend of Bunting, testified that, though Bunting was a wealthy man and abundantly able to give such "tips" as $5 to jurors who had rendered a verdict in his favor in a doubtful case, he was rather a close man, and, although he had been on the island with Bunting and known him for a long time, he had never heard of his giving $5 to anybody before, not even to the poor. This witness also testifies that he had heard rumors around that Bunting had talked with a certain one of the jurors during the trial, but said he did not know who he had heard make this statement.

The admission of Bunting is that when he had reason to expect litigation with Merritt over the right to lease and occupy, under the statute, the oyster-planting grounds involved in this case, he wrote the oyster inspector, whose duty it was to assign the grounds, as required by the statute, and who was in a position to give Bunting, as he thought, an undue advantage over Merritt, "offering to give him (Inspector Taylor) as much as anybody else would to assign him (Bunting) the grounds, stating that the reason he did this was because he had been told that in order to get an assignment of the grounds he would have to 'grease Taylor a little;'" and, further, that subsequently he told Taylor in person that he was in a position to give him as much to assign the grounds to him, Bunting, as any one else, "if he was being paid anything." In other words, Bunting admits that he was by illegal method—bribery—seeking to obtain through this public official, the oyster inspector, an undue advantage over Merritt in an anticipated litigation.

This conduct on Bunting's part is not only well calculated to cause distrust in the integrity of our courts, which have been for centuries regarded as the great bulwark of the liberties and immunities of the citizen against encroachment from any quarter, but, when considered together with the other facts and circumstances appearing in the record, arouses such a grave sus-

picion that something other than the law and the evidence influenced the jury in arriving at their verdict as to require that such conduct on the part of any litigant be condemned in the severest terms, so that it may be understood that a verdict obtained under such circumstances will not be sanctioned by a court of justice.

We are of opinion, for these reasons, as well as for the error in admitting at the trial the improper evidence adverted to, that the judgment of the circuit court should be reversed and annulled, the verdict of the jury set aside, and a new trial awarded.

STEVENS v. DUCKETT.

June 13, 1907.

[57 S. E. 601.]

1. Partnership—Accounting—Bill.—A bill alleged that complainant and defendant formed a partnership to operate a mine, defendant agreeing to furnish the money and complainant to furnish his experence and run the business, for which he was to have one-fourth interest in the property; that the agreement remained in force until January, 1904, when defendant claimed the exclusive ownership of all of the property, ejected complainant from the premises, and denied the partnership, on which allegations complainant prayed a decree establishing the partnership and for an accounting. Held, that the bill was not demurrable for want of equity.

2. Equity—Hearing—Issues—Submission to Jury.—An issue out of chancery will not be directed when the claim is altogether unsupported by evidence, nor unless there is a conflict of evidence so great, and the weight of the evidence is so equally balanced, that the court is unable to determine on which side the preponderance lies.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 792, 793.]

3. Same—Statutes—Construction.—Code 1904, § 3381, provides that any court in which a chancery case is pending may direct an issue to be tried in such court or in any circuit or corporation court, and may direct such an issue to be tried before any proof has been taken by either party, if it shall be shown by affidavit, after reasonable notice, that the case will be rendered doubtful by conflicting evidence. Held, that such section was merely declaratory of the previously existing rule, except that the proof required for the submission of an issue out of chancery is thereby permitted to be made by affidavit.

[Ed. Note.—For cases in point see Cent. Dig. vol. 19, Equity, §§ 792, 793, 801.]

4. Same—Discretion.—The right to an issue under such act is not